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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

Court of Appeals No. 34908-0

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

JEFFREY V. HORNE AND KRISTINA HORNE

Appellants

v. STEVEN F. SCHROEDER

Respondent

BRIEF OF APPELLANT

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INTRODUCTION

Horns filed an action against Mr. Schroeder alleging three causes of action; (1) Declaratory relief regarding the parties rights and obligations in the easement, including a declaration that no gates, fences or further obstructions should be erected within the easement, (2) an action for trespass to real property be Mr. Schroeder, and (3) Injunctive relief seeking prohibiting further destruction to Horn's property (the easement, the destruction of which consisted removing gates, and limiting the traveled portion of the easement to what they alleged was the historic 8 feet, requiring Schroeder to restore existing fencing and gates and further enjoining Mr. Schroeder from removing Horns' gates or fences within the 40 foot easement and require that Schroeder replace soil form grading (CP 01-49)

Schroeder denied trespassing and alleged that he had the right to remove fences and gates as they interfered with his use of the 40' easement he was granted and that the Court affirm that Mr. Schroeder was entitled to all permitted uses and maintenance of the 40' easement. Mr., Schroeder also maintained that the easement should not be reduced by the Court. He also sought injunctive relief requiring Horn's cease their activity of building obstructions, fences and defacing the easement (CP 050-112)

After a three day Court trial, the court entered Findings of fact and conclusions of law and ruling of the court in which it held:

1. The easement shall be limited to the "historic" travelled easement of 12-14 feet which can be broadened to 40 feet when the Schroeder property at the end of the easement is formally divided for development.
2. The gates and fences shall be installed and erected by Steven Schroeder as they were when the Horn's acquired the property on January 16, 2015. They shall be of the same quality as the originals and shall be of lightweight material so they can be easily opened and closed.
3. Schroeder shall be permanently enjoined from a) excavating within the 40 ft. easement b) removing any fencing and gates from the Horn property and c) harassing and contacting the Horn family.
4. The Horns shall be permanently enjoined form placing any obstructions on the property (CP 188-190).

Steve Schroeder this been using the easement for over twenty years and it was not until the filing of this litigation by the Horns that anyone sought to reduce the width of the easement. The scope of the easement is determined by looking at the language of the easement and the intent of the grantor. The easement was before the court and Jeff Braucher, the grantor of the

easement testified as to his intent when granting it. The easement was 40 feet and could be used for ingress, egress utilities and maintenance When the Horn's purchased their property through which the easement runs, the believed the easement was limited to use by utility companies for maintenance.

When Mr. Schroeder removed gates impeding his use of the easement and graded it, the Horns began to challenge him verbally and eventually by putting up posts, wire and spreading manure across the easement. When the Horns' gates were removed and arguments ensued, the Horns filed the present suit. The impediments placed by the Horns on the property became so obtrusive as to cause injury to one of Mr. Schroeder's disabled tenants and create hardship to Tony Bell, another of Mr. Schroeder's tenants who is also disabled. Because the Horns wished to allow their horses to graze on the easement, they erected a gate on the easement at their driveway. The gate was intentionally heavy and sometimes locked. Mr. Schroeder, his tenants, contractor's and were required to stop their vehicles, open the gate and get back in their vehicles. A fence which ran along part of the northern boundary of the Horn property but had been removed by them would have served to keep their livestock on their property. The only reason it was necessary for a gate at the Horns' driveway was to allow the Horn's livestock access to the easement without allowing the livestock to roam to the Road.

The same is true of a gate installed at the western end of the easement where the easements meets Williams Lake Road. The Horns' livestock can be well protected by the fence along the northern boundary of their property which separates the Horn property from the 40 foot easement. Although Horns may have suffered from buyers' remorse upon learning that Mr. Schroeder had a 40 foot easement across their land, they bought their property with proper legal notice of the easement as it was on record in Stevens County. The leading case on this issue is Littlefair v. Schultze, 169 Wash. App. 659 (2012) which held that the court must look to the language of the easement and the intent of the grantor in determining whether to limit or restrict the size of the easement. Both are in evidence in this case and clearly support Mr. Schroeder's position. Littlefair also controls the issue of the construction of gates or other impediments by the Horns on the easement holding that a gate(s) that can be opened and closed interferes with the use of the easement by the dominant estate owner clearly is the placement of posts, wire fences and manure on the easement by the owner of the servient estate. Schroeder wins because his easement was and always has been 40 feet wide and there is no basis for limiting it. The placement of gates in the easement interferes with his use of the easement granted to him when he purchased the property. This obstruction prevented Schroeder from using the whole easement and from plowing and grading the easement.

Assignments of Error

1. The Court's limitation of Mr. Schroeder's 40 foot easement to 12-14 feet was error because the clear intent of the grantors of the easement was for a 40 ft. easement for ingress, egress, utilities and maintenance.

A. Mere non-use of the easement by the dominate estate owner does not extinguish the easement owner's right to the easement.

B. Mt. Schroeder used the full 40 foot easement and non-use did not occur.

2. The court erred by ordering the reinstallation of gates and fences installed by the Horns on the easement.

A. The installation of a gate, even one that can be opened and closed, by the owner of the servient estate constitutes an interference in the rights of the easement owner to enjoyment of the easement.

3. The Court accordingly committed error by ordering Mr. Schroeder to reinstall gates and fences in the easement.

STATEMENT OF THE CASE

Steven Schroeder owns a 40 acre parcel of property located at Evans in Stevens County Washington. He acquired the property in 1995 along with his brother Hans Schroeder(EX 2). The property benefited from a forty foot non- exclusive easement for ingress, egress, utilities and the "right to maintain same" (The property was originally part of a larger parcel owned by Jeff Braucher, his siblings and other family members. After the death of his Father, Braucher and his family divided the larger parcel into separate parcels that included the property now owned by Mr. Schroeder EX D105. Without the easement, the parcel currently owned by Schroeder would be landlocked. (RP341). Over the years Schroeder used the easement for ingress and egress, maintained the easement by plowing it and grading it (RP 359, 452),. It was also used by Schroeder's tenant, Anthony Bell to access a home Mr. Bell rented from Mr. Schroeder on the premises. Horns were aware of this easement when they purchased their property as it was part of the chain of title although Jeffrey Horn thought that the easement was limited to utility access (RP 190). After the Horns moved in, disputes arose between them and Schroeder regarding the use and maintenance of the easement. When Schroeder bought the property there were no gates on the easement (RP 438). There was a fence running separating the easement from what is now

the Horns' property (RP 439). The owner previous to the Horns, Kunka, tore down the fence separating the property from the easement and constructed a gate at their driveway (RP 439). This forced Schroeder and his tenants Mr. Bell and Mr. Foster had to stop and open in order to access the property (RP440). The Horns then installed a gate at the west end of the easement, where it meets the road.

The Horns also placed physical constructions on the easement. Gordon Foster, a tenant of Mr. Schroeder's had been severely injured, had pins and replacements and could only get around by using two crutches (RP 308, 309). On one occasion Mr. was driving down the easement to access his residence on the Schroeder property when he was blocked by a pile of debris that had been placed on the easement. A neighbor, Ronald Harthan observed Mr. Fester get out of his vehicle and attempt to remove the debris pile. Before he could help, Mr. Foster had fallen. He had to be removed by ambulance (RP 308,309). Mr. Foster broke three ribs in this incident (RP 441). The Horns also built an obstruction out of wood and connected it with a wire fence which obstructed the easement (EX101), (RP 444-445). There was no other reason for the Horns to have put up the post. In addition to putting up the barricade and piling brush on the easement, the Horns also spread animal manure on the easement. (RP 331).There were three gates on the easement. One, Gate 1 is at the west end of the easement and the entrance to the road,

Williams Lake Road RP.(466), Finding of Fact I (CP183) (EX p-25B). The second, gate two, sits at the end of the Horns' driveway but blocks the easement and must be opened and closed by Horns and Schroeder Finding of Fact J, CP 183), (EX 25-A, 25-B). The third gate, gate 3 sits at the eastern end of the easement where the easement enters Schroeder's property (Finding of Fcat I), (CP 183), EX25A shown by a blue dash). Mr. Schroeder and his tenants are required to open the two gates (gates 2 and 3). Schroeder also grades the easement to keep it smooth and passable. In the winter he plows the easement and uses the whole 40 feet to accomplish it (RP 453-455, EX 104). The Horns objected to his grading and the Court has restrained Mr. Schroeder from doing so in the future.

ARGUMENT

1. Scope of Review

When reviewing a trial court's decision following a bench trial, the court determines whether substantial evidence supports the findings of fact and, if so, whether the findings of fact support the conclusions of law. Zunino v. Rajewski, 140 Wn.App. 215, 220, (2007). Substantial evidence is a sufficient quantity of evidence to persuade a fair-minded, rational person that the finding is true. Bering v. Share, 106 Wn.2d 212, 220, (1986). The Court

reviews conclusions of law de novo. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880 (2003).

2. Schroeder is entitled to the use of the forty foot easement granted by the Drafters of the Easement.

Trial court failed to consider ancillary uses

Littlefair v. Schulze, 169 Wash. App. 659, 664, 278 P.3d 218, 221 (2012), as amended on denial of reconsideration (Sept. 25, 2012)

[¶17] Also, the trial court's findings do not support its conclusions because the trial court failed to consider or account for the ancillary uses of the easement, such as maintenance of the road, which are expressly included in the conveyance language. See Brown v. Voss, 105 Wn.2d 366, 371 (1986) (where the language of an express easement is unambiguous, courts look to the original

In determining the scope of an easement, the court must look to the language of the easement and the intent of the grantor in determining whether to limit or restrict the size of the easement Littlefair v. Schultze, 169 Wash. App. 659, (2012) , review denied 176 Wn.2d 1018 (2013), Zobrist v. Culp, 95 Wash.2d 556, 561 (1981); Seattle v. Nazarenus, 60 Wash.2d 657, 665 (1962) The easement contained in the deeds of both parties is unambiguous. It clearly states that the easement is 40 feet wide can be used for ingress, egress, maintenance and utilities, Finding of Fact, D, (CP 179).Maintenance includes grading and snow removal. Although the servient owner is entitled to reasonable use of the easement, it cannot interfere with the original

purposes of the easement Littlefair, id at p. 665. It is the right and duty of the owner of the dominant estate, Mr. Schroeder to maintain the easement. The original purpose of the easement is clearly expressed in the granting document and is also supported by the testimony of one of the granting parties, Jeffrey Braucher. The court found that both Mr. Horn and Mr. Schroeder misunderstood the scope of the easement (Finding of Fact N CP 184). Schroeder agrees that Horn misunderstood the scope of the easement, Horn has so testified. Schroeder disputes this finding insofar as it relates to Schroeder not understanding the scope of the easement. Schroeder correctly believed that he had the right to drive on the easement as well as maintaining it. Schroeder believed he was entitled to use the entire 40 feet granted him. Nonuse of a portion of the easement by the owner of the dominant estate does not entitle the servient estate owner to reduce the scope of the easement. Littlefair, id at p 666, Thompson v. Smith 59 Wn 2d 397, 407 (1962). In Littlefair, the trial court had limited a forty foot easement to the 12-14 feet historically used for driving. The Court of appeals reversed the trial court holding that the owner of the dominant estate is entitled to use the full easement for traversing the easement and for snow removal Littlefair, Id at p, 668. In the present case, the court's limitation of the easement was erroneous and Schroeder should be entitled to use the full easement for these purposes.

3. Gates on the easement constitute an undue interference with the use of the easement

In Littlefair, the court discussed fences that had been placed upon the easement and determined that they constituted an obstacle that must be removed. It held that the servient owner cannot build structures that interfere with the easement and would, by adverse possession, deny the dominant owners their right to future expand easement use. Littlefair, id at p. 666. It is apparent that the structure depicted in ex consisting of posts and wire is a permanent structure whose sole purpose is to prevent Schroeder from accessing portions of the untraveled easement. This structure interferes with Mr. Schroeder's ability to plow, grade and otherwise use the easement. It is clear that it must be removed and that any permanent structure or any other impairment such as brush cuttings and animal manure should also be removed and Horns should be enjoined from creating such nuisances in the future. Bowlby v. Williams, 179 Wash. App. 1015, (2014)

In Littlefair, fences on property were required to be removed where they partially blocked roadway (could lead to claim of abandonment by dominant estate holder.) The Easement holder had to drive around it. (CP 445). Littlefair v. Schulze, 169 Wn.App. 659, 278 P.3d 218 (Div. 2 2012).

When Schroeder purchased the property, there were no gates on the easement (RP 29). It was not until the Kunkas purchased what is now the Horn property that gates were installed (RP 439). Accordingly Schroeder had a reasonable expectation that he would be able to drive down his easement unimpeded by fences or gates. It is unreasonable to expect Mr. Schroeder, his tenants or guests to stop and open and close the two gates. Horns do not graze their horses on the easement[1] and it is an open question whether grazing livestock on the easement would interfere with Mr. Schroeder's access and maintenance to the easement. Since no livestock graze on the easement, the need for gates No. 2 (at Horns' driveway and gate no. 1 (closer to Williams Lake Road) would be outweighed by Mr. Schroeder's right to plow, grade and maintain the easement.

Mr. Schroeder does have the right to grade the easement. The quitclaim deed drafted by the Brauchers provided that the easement was for maintenance as well as other uses. In order to prevent the easement from becoming overrun or marred by holes and other natural obstructions, Mr. Schroeder believes he needs to periodically grade the easement. Generally, responsibility for the maintenance and repair of an easement to keep it in proper condition lies with the owner of the easement-the dominant estate. 1 Wash. State Bar Ass'n, Washington Real Property Deskbook § 10.4(2)(c) (3d

[1] Mr. Horn testified that he believes he has the right to graze horses on the easement (RP 227).

ed. 1997). The gates interfere with the plowing and the grading and other maintenance and use of the easement.

"Whether or not the owner of land, over which an *31 easement exists, may erect and maintain fences, bars, or gates across or along an easement way, depends upon the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case; the nature and situation of the property subject to the easement; and the manner in which the way has been used and occupied. Evich v. Kovacevich, 33 Wash.2d 151, 204 P.2d 839 (1949). Similarly, if the easement is ambiguous or even silent on some points, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances. Seattle v. Nazarenus, 60 Wash.2d 657, 374 P.2d 1014 (1962)'.

Rupert v. Gunter, 31 Wash. App. 27, 30–31 (1982)

In Rupert, the owner of the servient estate sought to erect gates on the easement due to the fact that motorists were speeding down the easement. The Court held that since this was an unanticipated and undue burden on the property owner, the court did not abuse its discretion by permitting the erection of gates on the easement. The Court recognized that the easement holder would be inconvenienced by having to open and close gates to access his property but balanced that inconvenience against the greater inconvenience and possible danger of cars speeding down the easement. In the present case, the balancing test favors Mr. Schroeder. Mr. Horn testified that the reason he needed the gates (at least gate 1) at the intersection of Williams Lake road and the easement was to prevent his

horses from wandering onto the highway if they roamed from his pasture onto the easement. This could be prevented by the fence Mr. Schroeder installed along the boundary between his pasture and the easement. The court recognized that it was an inconvenience for the easement holder to stop and open gates. In this case it ids a greater inconvenience for Mr. Schroeder's tenant, Anthony Bell, who is disabled to open the gates. Also, the gates interfere with the grading and plowing of the easement.

The Horns' need for gate 2 is even less clear. It does not appear to limit or control horses or overstock in any way. Horn testified that the purpose of gate 2 was to keep the horses from getting onto Mr. Schroeder's property (RP103) however there is a gate, gate 3 at the end of the easement as it borders Mr. Schroeder's property which would prevent this.

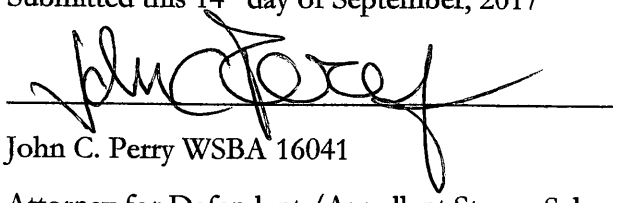
CONCLUSION

Mr. Schroeder is entitled to the 40 foot easement that benefited his property when he purchased the property. Other than Mr. Horn's mistaken belief when he purchased his property that the easement was limited to utilities, there is no valid reason to reduce Mr. Schroeder's easement. Mr. Schroeder has since he purchased the property used the entire easement. He grades it to prevent it from being impassable and plows it in the winter.

These activities would not be permissible under the court's ruling limiting the width of the easement. Mr. Schroeder purchased the land with the easement and relied on the easement at the time he purchased it. The only thing that has changed since then is that the Horns purchased property subject to the easement and decided that they would limit Mr. Schroeder's use. Even if the evidence showed that Mr. Schroeder didn't use the entire easement, non-use does not in and of itself permit limitation of the width of the easement. The Court found that Mr. Schroeder intended to develop the property in the future and its remedy that the easement would be widened at that time to the original 40 feet does not make sense. The Horns have made no showing that their need for gates on the easement outweighs the inconvenience caused to Mr. Schroeder, his tenants and guests by being forced to drive around and or open the gates sought by the Horns. They already have their horses enclosed in fencing and only want gate number 1 as a fail-safe method of keeping their horses from wandering into the road. This can be achieved if necessary by parallel fencing between the Horns' property and the easement.

Mr. Schroeder asks the court to reverse the trial court's decision to reduce the size of the easement and to also reverse the court's decision to permit fencing within the easement.

Submitted this 14th day of September, 2017



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CERTIFICATE OF SERVICE

John C. Perry certifies as follows:

On September 14, 2017, I served the Brief of Appellant on attorney for Respondents by electronic means as follows:

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Dared this 14th day of September, 2017

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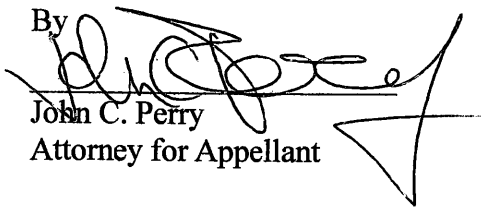

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